IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NOS. 80 AND 84 OF 2000.

CRIMINAL APPEAL NO. 80 OF 2000.

Mr. Shobram Sanjeev,
Central Jail, Aguada, Goa. ... Appellant.

Versus

State of Goa,
represented by Officer-in-Charge
CID/CB Police Station,
Panaji, Goa. ... Respondent.

CRIMINAL APPEAL NO. 84 OF 2000.

Mr. Bhagatram,
Central Jail, Aguada, Goa. ... Appellant.

Versus

State of Goa,
represented by Officer-in-Charge
CID/CB Police Station,
Panaji, Goa. ... Respondent.

Mr. J.P. D'Souza with Miss Caroline Colasso, Advocates for the Appellant in both Appeals.

Mr. A.P. Lawande, Public Prosecutor for the State in both Appeals.

Coram: P.V. HARDAS, J.

Date: 2nd August 2002.

ORAL JUDGMENT.

The appellant in Criminal Appeal No. 80 of 2000/Original Accused No. 1 and Appellant in Criminal Appeal No. 84 of 2000/Original Accused No. 2 challenge their conviction for an offence punishable under Section 20(b)(ii) of the N.D.P.S. Act, 1985 and the sentence of ten years rigorous imprisonment and fine of Rupees One Lakh, in default simple imprisonment

for one year, passed by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No.2 of 1999, by Judgment dated 25th September, 2000. Since both the appellants have been convicted in the same case by one Judgment, both the Appeals are being decided by this common Judgment.

2. The facts necessary for the decision of the Appeals are set out hereunder:-

P.W.4 P.I. Gajanan Prabhu Dessai was working, at the relevant time, as Police Inspector and was attached to C.I.D. Crime Branch, Panaji. On 29th December 1998, P.W.4 P.I. Prabhu Dessai received a specific and reliable information that two persons Bhagatram and Shobram of Himachal Pradesh, between the age group of 20 to 25 years, having fair complexion would be coming on 30th December 1998 below old Mandovi Bridge, Panaji, to deliver a consignment of charas. P.W.4 P.I. Prabhu Dessai was, further, informed that the consignment of charas would be in a maroon colour shoulder bag. On receipt of the information, P.W.4. P.I. Prabhu Dessai reduced the information into writing and submitted the same to his Superior Official P.W.7 Dy.S.P. Shri A.K. Teli. A copy of the said information is at Exhibit P.W.4/D.

3. P.W.4 P.I. Prabhu Dessai then secured the presence of two panchas on the next day from the Office of the Mamlatdar at Panaji. The two panchas are P.W.3 Yosef Tatoba Dhupdale and one Niwas, son of Raghoba Dessai. P.W.4 P.I. Prabhu Dessai then informed the panchas that he had received information and requested them to act as panchas. Both the witnesses agreed to act as panchas. The panchas were then introduced to the members of the raiding party which consisted of P.W.7 Dy.S.P. Shri Teli, P.I. Tony Fernandes, P.I. Lavu Mamledar and other Police Officials. P.W.4 P.I. Prabhu Dessai obtained the seal of C.I.D. Crime Branch, Panaji and also obtained the necessary weighing scale and other materials for packing and sealing from the Anti Narcotic Cell Police Station and at 10.30 a.m. proceeded to the site along with the members of the raiding party including the panchas. At about 10-45 a.m., the entire raiding party reached near the old Mandovi Bridge and saw two persons coming towards the bus stand. It appeared to the members of the raiding party that the said two persons were searching for somebody. Since the description of the said two persons tallied with the description received by P.W.4 P.I. Prabhu Dessai, it was concluded that the said two persons were the persons against whom secret and reliable information had been received. The members of the raiding party, on the signal from P.W.4

P.I. Prabhu Dessai, surrounded the said two persons. P.W.4 P.I. Prabhu Dessai then introduced himself and also introduced the members of the raiding party and panchas. P.W.4 P.I. Prabhu Dessai then apprised the two persons that he had received specific and reliable information that they were dealing in drugs and that he wanted to conduct their search for drugs. The said two persons were also told that P.W.7 Dy.S.P. Shri Teli was a Gazetted Officer. The said two persons were then informed that they had a right to be searched in the presence of P.W.7 Dy.S.P. Shri Teli, as a Gazetted Officer, or any Magistrate of their choice. The said two persons replied that they preferred to be searched in the presence of P.W.7 Dy.S.P. Shri Teli. The said two persons also declined to search the members of the raiding party including the panchas. On being asked their names, the said two persons gave their names as Shobram Sanjeev and Bhagatram, the two appellants before me in the Appeals. Original accused no. 1 Shobram was carrying with him a maroon colour shoulder bag. He was told to keep the shoulder bag on a parapet. P.W.4 P.I. Prabhu Dessai questioned accused no. 1, Shobram regarding the contents of the shoulder bag and the accused no. 1 is alleged to have stated that it contained charas. The shoulder bag was then searched and a yellow colour plastic bag was found in the compartment of the bag. Inside the said plastic

bag, there was another pink colour plastic bag. On opening the pink colour plastic bag a black colour substance was noticed which was charas. The substance was weighed and it was found to weigh 1.440 kgs.. It was then put in a yellow colour bag and then in a cloth line envelope and packed and sealed. It was signed by the panchas, accused no. 1, Shobram and P.W.4 P.I. Prabhu Dessai. The shoulder bag was also packed and sealed in the same manner as the charas was sealed. Certain personal belongings were found on taking the search of accused no.1, Shobram which included cash and visiting card. They were also packed and sealed in an envelope. Accused no. 2 Bhagatram was searched and in his right hand pant pocket a green colour polythene bag with some substance was found. The substance was cylindrical in shape and was suspected to be charas. On weighing the same, it was found to weigh 112 gms. It was then put in an autopress polythene bag and then put in an envelope, packed and sealed. Signatures of the panchas, accused no. 2, Bhagatram and P.W.4 P.I. Prabhu Dessai, were obtained. The pant of the accused no. 2, Bhagatram, was also packed and sealed. Both the accused were then asked to produce documents regarding the possession of the drugs. The accused were unable to produce any documents. A Seizure Report was made and a copy was given to both the accused. Exhibits P.W.3/B and P.W.3/C are the Seizure Reports.

A panchanama was scribed in the presence of the panchas and the same is at Exhibit P.W.3/A. The accused were then brought to the Police Station and an offence was registered against them on the basis of the complaint Exhibit P.W.4/A. The grounds of arrest are at Exhibit P.W.4/F Colly. The intimation sent to the superior Officer under Section 57 is at Exhibit P.W.4/H. By letter at Exhibit P.W.4/G accompanied by the letter of specimen seal at Exhibit P.W.1/B the property was requested to be sent for analysis.

4. The sample was analysed by P.W.1 Mahesh Kaissare and by his report at Exhibit P.W.1/D opined that the substance analysed by him was charas. P.W.4 P.I. Prabhu Dessai then filed a charge-sheet against the present appellants. A charge, vide Exhibit 3, was framed against both the appellants. The appellants abjured their guilt and claimed to be tried. The prosecution in support of its case examined in all seven witnesses. P.W.1 Mahesh Kaissare analysed the samples. P.W.2 is Manohar D. Joshi, who, at the relevant time, was working as Scientific Assistant in the Crime Branch and who had forwarded the samples for analysis. P.W.3 Yosef Tatoba Dhupdale is the panch witness. P.W.4 P.I. Prabhu Dessai is the Investigating Officer. P.W.5 is Tony Fernandes, who had handed over the seal to P.W.4 P.I. Prabhu Dessai.

P.W.6 is Lavu Mamledar, who had handed over the weighing scale and the weights to P.W.4 P.I. Prabhu Dessai. P.W.7 is Dy.S.P. Shri Teli, who is the immediate superior to P.W.4. P.I. Prabhu Dessai.

5. The learned trial Court accepted the prosecution evidence and held that an offence as alleged was made out against the appellants and convicted and sentenced them as aforestated.

6. P.W.4 P.I. Prabhu Dessai is the Investigating Officer and he states that on 29th December 1998 he was working as Police Inspector attached to C.I.D. Crime Branch, Panaji. On that day he had received a specific and reliable information that two persons, namely, Bhagatram and Shobram Sanjeev of Himachal Pradesh, between the age group of 20 to 25 years, speaking Hindi, would be coming on 30th December 1998 below old Mandovi Bridge to deliver a consignment of charas. He had also received information that the consignment of charas would be in a maroon colour shoulder bag. The said information was reduced into writing and was submitted to the immediate superior, that is, P.W.7 Dy.S.P. A.K. Teli. P.W.4 then secured the presence of two panchas, P.W.3 Yosef Tatoba Dhupdale and one Niwas son of Raghoba Dessai. P.W.4 P.I. Prabhu Dessai communicated the information, which

he had received, to the panchas and requested them to act as panch witnesses. Both the witnesses agreed to act as panch witnesses. The panchas were then introduced to the members of the raiding party consisting of Dy.S.P. Teli (P.W.7), P.I. Tony Fernandes (P.W.5), P.I. Lavu Mamledar (P.W.6) and other other Police Officials. P.W.4 obtained the seal of C.I.D. Crime Branch, Panaji, from P.I. Tony Fernandes and also obtained the weighing scale and material for packing and sealing from the Anti Narcotic Cell Police Station. The raiding party, consisting of the police officials and the panchas proceeded to the site in three private vehicles at about 10.30 a.m. and within five minutes reached the old Mandovi Bridge. At about 10.45 a.m. the raiding party saw two persons coming towards the bus stand and it appeared to the members of the raiding party that the said two persons were searching for someone. The description of the said two persons tallied with the description of the persons received by P.W.4 P.I. Prabhu Dessai and the members of the raiding party were, accordingly, informed by P.W.4 Prabhu Dessai. The members of the raising party then surrounded the said two persons and P.W.4 P.I. Prabhu Dessai introduced himself as a Police Inspector and also introduced the other members of the raiding party. P.W.4. P.I. Prabhu Dessai then informed the said two persons that he had specific and

reliable information that the said two persons were dealing with drugs and he wanted to conduct their search for drugs. He also informed the said two persons that P.W.7 Dy.S.P. Teli was a Gazetted Officer and told the said two persons that they have a right to be searched in the presence of Dy.S.P. Teli as a Gazetted Officer or any Magistrate of their choice. The said two persons then stated that "they preferred for search in the presence of Dy.S.P. Shri Teli". P.W.4 also volunteered himself and the panchas for search by the said two persons but, they declined to search. On being asked, the said two persons gave their names as Shobram Sanjeev and Bhagatram, hereinafter referred to as 'the appellants'. Appellant Shobram was carrying a maroon colour shoulder bag. He was told to keep the shoulder bag on a parapet. He was questioned regarding the contents of the shoulder bag and the appellant Shobram is alleged to have stated that it contains charas. The shoulder bag was then searched and in one of the larger compartments a yellow colour plastic bag was noticed. Inside the said plastic bag there was another pink colour plastic bag. The pink colour plastic bag contained blackish substance which was suspected to be charas. The pink colour plastic bag was taken out and weighed and it weighed 1.440 kgs.. It was then replaced in the yellow colour bag and, thereafter, put in an envelope and then

packed and sealed. The signatures of the panchas were obtained and the envelope was signed by P.W.4 P.I. Prabhu Dessai and the appellant Shobram. The search of the other compartments of the bag did not reveal anything and, therefore, the bag was then packed and sealed by following the same procedure. On personal search of appellant Shobram, one rexine bag with cash and visiting card were found. The said bag was also sealed. Thereafter, appellant Bhagatram was searched a in his right hand trouser pocket a green colour polythene bag with some substance was found. The substance was round flat cylindrical and was smelling of charas. On weighing it was found to weigh 112 gms.. It was then put in an autopress polythene bag and, thereafter, put in an envelope and packed and sealed. Cash of Rs. 10/- was found in the other pocket of his trouser. The trouser of appellant Bhagatram was also packed and sealed. The appellants were asked whether they had any documents in their possession to account for the possession of the drugs and both the appellants replied in the negative. Seizure reports Exhibit P.W.3/B and P.W.3/C were prepared. A panchanama of the sequence of events at Exhibit P.W.3/A was drawn. the appellants were then brought to the Police Station and an offence was registered against them on the basis of the complaint, which is at Exhibit P.W.4/A. The copy of the information is at Exhibit P.W.4/B. The

confidential letter issued by P.W.4 P.I. Prabhu Dessai is at Exhibit P.W.4/C. Exhibit P.W.4/D is the letter by which P.W.4 P.I. Prabhu Dessai requested P.W.5 P.I. Tony Fernandes to deliver the seal. The letter at Exhibit P.W.4/E is addressed to the Anti Narcotic Cell for giving the weighing scale. P.W.4/F Colly are the two grounds of arrest of the appellants. By letter at Exhibit P.W.4/G, the Senior P.I. was requested to send the property for analysis. The intimation under Section 57 of the N.D.P.S. Act is at Exhibit P.W.4/H. The specimen seal letter is at Exhibit P.W.1/E.

7. In the cross-examination P.W.4 P.I. Prabhu Dessai has admitted that one pancha was driving a Maruti car bearing registration No. GA02-A-7850. He has also admitted that he was knowing the pancha who was driving the vehicle since six months prior to the date of the raid. He has further admitted that he had not taken him as a pancha in any other case. He has stated that he does not know whether he was the driver of P.I. Tony Fernandes. Incidentally it may be stated that the second pancha Niwas, son of Raghoba Dessai, was a panch witness in Special Criminal Case No. 11 of 1998, the appeal against which was decided by me, namely, Criminal Appeal No. 55 of 2001. P.W.4 has then admitted that he had met the second pancha outside the police headquarters and the second pancha had come

to the Crime Branch at 10.00 a.m. on his request. He has further admitted that he had not sent for him and had casually requested him to act as a panch witness. Initially P.W.4 denied that the second panch, namely, P.W.3 Yosef Tatoba Dhupdale had not acted as a panch in any other panchanama relating to the present case. He, however, admitted that the said panch was a panch with regard to a search panchanama at Sharada Lodge at Bicholim and on another occasion the panch was also seen by him at Panaji. He also admitted that he did not give anything in writing to the panch requesting him to act as a panch witness. He has admitted that in the intimation under Section 57 of the N.D.P.S. Act it is not mentioned the place from where the drugs were recovered. He denied the suggestion that no drugs had been recovered and no documents had been scribed relating to the recovery of drugs. In the cross-examination, at the behest of appellant Bhagatram, P.W.4 has admitted that the car in which he was travelling was driven by panch Niwas Dessai. He has also admitted that the car which was driven by Niwas Dessai did not belong to him.

8. P.W.3 Yosef Tatoba Dhupdale, a panch witness, states that on 30th December 1998, he was requested by the police to act as a panch witness and he was taken to the office of C.I.D. Crime Branch,

Panaji. He states that a letter was received by the Mamlatdar for sending one Official to act as a panch and, accordingly, he was told to act as a panch by the Mamlatdar. He states that he was told by P.W.4 P.I. Prabhu Dessai that he will have to act as a panch witness alongwith one Niwas Dessai. He states that he was informed about the information received by P.W.4 P.I. Prabhu Dessai. He also states that they were introduced to four Police Inspectors, three Sub-Inspectors, one Head Constable and two Constables, who were members of the raiding party. He then states about reaching the bridge and surrounding the appellants. He then states that P.W.4 P.I. Prabhu Dessai introduced himself and the other members of the raiding party. He also states that the appellants, on being asked what was in their bags, did not say anything. P.W.3 has further stated "I do not remember what was done before he was asked to open the bag. Thereafter acc.no. 1 opened the bag. The acc. no. 1 thereafter himself opened the bag and showed that there was one polythene bag of yellow colour and inside polythene bag of pink colour." P.W.3 has further stated that on the basis of the odour of the substance inside the bag P.W.4 P.I. Prabhu Dessai stated that it was charas. P.W.3 also states that the said substance was weighed and it was 1.440 kgs. and it was. thereafter, packed and sealed. He further states that thereafter

the accused was searched, but nothing was found. P.W.3 has then stated that on search of appellant Bhagatram, charas was found, which was weighing 112 gms. which was seized and sealed. One purse with currency notes with some coins and visiting card were also found. They were also packed and sealed. The clothes of the appellants were also sealed separately. He then states that P.W.4 P.I. Prabhu Dessai told the accused that they had committed a crime under the N.D.P.S. Act and were taken into custody. He has also stated that the maroon colour bag was also sealed alongwith the clothes. P.W.3 then states that thereafter the accused were asked if they wanted to search the members of the raiding party. He states that a panchanama was drawn, which was signed by the two panchas and the accused. On further questioning by the learned Public Prosecutor, P.W.3 admitted "to start with Shri Prabhu Dessai had asked the acc. as to whether their search was required to be taken before a Magistrate or a Gazetted Officer. The acc. did not reply."

9. In cross-examination P.W.3 has admitted that P.W.4 P.I. Prabhu Dessai had spoken to the accused in Hindi regarding their search and the Hindi version giving the exact words was not recorded in the panchanama, but a translation in English was recorded. He has also admitted that a joint offer was given to

both the accused. He has admitted in the cross-examination that he was a panch in village Cuncolim where there was a theft of electricity. He has stated that he does not know who was driving the car. He has further stated that P.I. Prabhu Dessai and the second panch were sitting behind the driver next to him while returning. He has stated that he cannot describe the driver of the vehicle. He has also stated that only one offer was given for searching the accused either before a Magistrate or a Gazetted Officer. He has also stated that the police had given an offer to the accused of being searched in the presence of Shri A.K. Teli and that P.I. Prabhu Dessai "told the acc. that Shri A.K. Teli was a Gazetted Officer". He then states that P.I. introduced the members of the raiding party to the accused and informed that he would take their search in the presence of Gazetted Officer Shri A.K. Teli. He states that this was told to the accused in Hindi in the beginning and, thereafter, no other offer was given for search either before a Gazetted Officer or a Magistrate. The omission was brought out from the panchanama that it was not recorded that accused no. 1 was searched in the presence of Shri A.K. Teli. He has stated that the accused were brought about 15 to 16 metres under a street light to record the panchanama and that it was at this place that the actual search

was conducted. He states the besides two Police Inspectors and one policeman and the two panchas, no other person was present when accused no. 1 was searched.

10. In the cross-examination by the appellant Bhagatram, he has stated that the two accused were about 14 to 15 apart from where they were caught. He states that appellant Bhagatram was caught by other police officers including P.S.I.. He states that appellant Bhagatram was apprehended by Shri Teli. He states that after the appellants were apprehended they were at a distance of 16 metres from each other and when the offer of search before a Gazetted Officer or a Magistrate was given to appellant Shobram, the appellant Bhagatram was at a distance of 15 to 16 metres. He admits that there was traffic on the road. He states that the two appellants were searched simultaneously and the appellants were at a distance of 5 to 6 metres away from each other when they were searched. He has also admitted that a common offer was given to both the accused and the offer was given only once.

11. In the panchanama Exhibit P.W.3/A it is stated that P.I. Shri Prabhu Dessai introduced Shri A.K. Teli as Dy.S.P., C.I.D. Crime Branch, Panaji,

and further informed the accused that Shri A.K. Teli is a Gazetted Officer. In the complaint at Exhibit P.W.4/A it is stated that Shri A.K. Teli was introduced as Dy.S.P. and the accused were informed that he is a Gazetted Officer.

12. P.W.5 Tony Fernandes has stated that he was a member of the raiding party and from the custody of the appellant Shobram about 1.440 kgs. of charas and from the custody of the appellant Bhagatram 112 gms. of charas were recovered. In the cross-examination P.W.5 Tony Fernandes has admitted that he was knowing panch Niwas Dessai as he had taken him as a panch in a case under the N.D.P.S. Act. He has admitted that the said case was State v. Ritesh Morajkar. He also states that he knows him because he was from his village. He has admitted that he knows him for the last two years. He has admitted that the said panch was driving the vehicle while going for the raid bearing registration No. GA-02-7850, which is owned by the wife of P.W.5 Tony Fernandes. In the cross-examination he has also admitted that the panchanama was conducted below the old Mandovi Bridge. He has admitted that during the writing of the panchanama the accused were at the spot and they were not taken anywhere.

13. P.W.6 Lavu Mamledar has stated that on 30th December 1998 he had received a letter from P.W.4 P.I. Prabhu Dessai requesting for weighing scale and weights. The said letter is at Exhibit P.W.4/E. He states that he was also a member of the raiding party. He states that on the person of appellant Shobram 1.440 kgs. of charas and from the person of appellant Bhagatram 112 gms. of charas were attached. In the cross-examination he has admitted that he was present during the entire raid.

14. P.W.7 Deputy Superintendent of Police Appa Teli states that he had accompanied the other police officials for raid. He states that from the custody of accused no. 1 charas weighing 1.440 kgs. and from the custody of accused no. 2 charas weighing 112 gms. were recovered. He states that Shri Prabhu Dessai had told the accused that they had a right to be searched in the presence of a Gazetted Officer or a Magistrate and the accused had declined the offer. He has also admitted that the accused were told that P.W.7 was a Gazetted Officer. In the cross-examination he has admitted that he does not know the exact words used by P.I. Prabhu Dessai for giving the option to the accused for being searched. He was confronted with his previous statement in which he had not stated that the accused had declined the offer. He has further stated

in the cross-examination that he was present when the entire panchanama was recorded.

15. Mr. D'Souza, the learned counsel appearing for the appellants, has urged before me (1) that there is a total non-compliance of Section 50 of the N.D.P.S. Act as a joint offer was made to both the appellants and from the evidence of P.W.3 it is clear that when the joint offer was made, the appellants were at a distance of 15 to 16 metres from each other; (2) that the evidence of P.W.3 and P.W.4 is discrepant and the evidence of P.Ws. 5, 6 and 7 does not suggest that the drugs from appellant Shobram were seized from the bag; (3) that P.W.7 Dy.S.P. Teli, who is a Gazetted Officer, had accompanied the raiding party and it was suggested to the appellants that the search could be taken in the presence of Dy.S.P. Teli; and (4) that P.Ws. 5, 6 and 7 have stated that the drugs were recovered from the possession of the appellants and they do not refer to the fact that drugs were recovered from appellant Shobram from a bag.

16. Mr. Lawande, the learned Public Prosecutor appearing for the prosecution, has urged before me that the discrepancy between the evidence of P.W.3 and P.W.4 is minor and does not in any manner affect the prosecution case. According to the learned Public

Prosecutor for the State, the evidence overwhelmingly points to the fact that drugs were seized from the possession of the accused after complying with the provisions of Section 50 of the N.D.P.S. Act. The learned Public Prosecutor for the State, therefore, has supported the Judgment of the learned trial Court.

17. P.W.3 has stated that the appellants were at a distance of 15 to 16 metres when the offer was given to the appellants for being searched either in the presence of a Magistrate or a Gazetted Officer. He has also stated that P.W.4 P.I. Prabhu Dessai had introduced the members of the raiding party and informed them that he would take their search in the presence of Gazetted Officer Shri A.K. Teli. He has stated that this was told to the appellants in the beginning. He states that after this no other offer to be searched in the presence of a Gazetted Officer or a Magistrate was given, either in English or in Hindi. From the admission given by P.W.3 in the cross-examination, it is clear that the only offer that was given to the appellants was that P.W.4 P.I. Prabhu Dessai would search them in the presence of A.K. Teli. This is apparent in view of the earlier admissions given by this witness in the cross-examination that only one offer was given. That this was the only offer which was given to the accused, is further clarified by

P.W.3 when he states that apart from this no other offer was given to the appellants. Mr. D'Souza, the learned counsel appearing for the appellants, has invited my attention to the unreported Judgment of the Division Bench of this Court in Criminal Appeal No. 673 of 1996 alongwith Criminal Appeal No. 14 of 1997, dated 13th September 2000. In the said unreported Judgment it was urged before the Division Bench that while the accused were apprised of their legal right regarding search as contemplated by Section 50 of the N.D.P.S. Act, the Officers of the raiding party also informed them that the concerned Officers were Gazetted Officers. On the basis of this, it was urged before the Division Bench that the accused had declined to be searched either before a Gazetted Officer or the nearest Magistrate. The attention of the learned Judges, who heard the said appeals, was invited to a Judgment of this Court in **Mohanlal Khetaram Jangid v. State of Maharashtra,** reported in 1998 (5) Bom.C.R. 771 wherein it is observed thus:-

> " The object of Section 50 is clear. It intends to ensure that search, if so required by the accused should be taken in front of an independent and a responsible officer. This independent and responsible officer in Section 50 has been mentioned as either a Gazetted Officer or a Magistrate. Even though the raiding party could be accompanied by a Gazetted Officer, surely such a Gazetted Officer would not be an independent or responsible officer

> contemplated by Section 50, as he cannot be considered to be an independent officer. hence, when the accused is informed that he will be searched in the presence of a Gazetted Officer who is a member of the raiding party, same will not amount to compliance with the provisions of Section 50."

The Division Bench, therefore, relying upon the aforesaid Judgment held that Section 50 had not been complied with. The Division Bench further held that since all the accused were jointly apprised of their right under Section 50(1) of the N.D.P.S. Act, there was no valid compliance with the said provision and, therefore, the search was vitiated.

18. A close scrutiny of the evidence of P.W.3, the panch witness would suggest that there is no corroboration between panch witness and the Investigating Officer P.W.4 P.I. Prabhu Dessai. P.W.3 states that initially when the accused were surrounded they were at a distance of 15 metres from each other. He states that Shri A.K. Teli had apprehended accused no. 2 Bhagatram. This fact is not corroborated either by P.W.4 P.I. Prabhu Dessai or P.W.7 Dy.S.P. Teli. P.W.4 P.I. Prabhu Dessai states that the two appellants were together and the raiding party had surrounded them. P.W.3 further states that appellant Bhagatram attempted to run away. P.W.4 does not corroborate this fact. P.W.3 then further states that the appellants were at a distance of about 15 to 16

metres from each other and both the appellants were searched simultaneously. P.W.4 P.I. Prabhu Dessai states that the appellants were searched one after the other. P.W.3 states that when the appellant Shobram was searched only two Police Inspectors and one Policeman and the two panchas were present. This statement completely belies the prosecution case that the appellants were searched in the presence of Dy.S.P. P.W.7 Teli, who was a Gazetted Officer. P.W.3 states that the accused were not searched at the place where they were apprehended but were brought near a street light, that is, about 15 metres from the place where they were accosted and the panchanama was scribed at that place. P.W.5 P.I. Tony Fernandes has stated that during the time of writing the panchanama the accused were on the spot and were not taken any where. P.W.3 has stated that P.I. Prabhu Dessai had told the accused that he would be searching them in the presence of A.K. Teli, who was a Gazetted Officer and apart from this no offer was given to the accused. P.W.4 P.I. Prabhu Dessai states that the accused were given the offer of being searched either in the presence of a Gazetted Officer or a Magistrate. Apart from this, P.W.3 and P.W.4 stated that charas was recovered from the bag in possession of appellant Shobram. P.W.5 P.I. Tony Fernandes, P.W.6 P.I. Mamledar and P.W.7 Dy.S.P. Teli stated that charas was recovered from the person

of appellant Shobram and though all these three witnesses claim to be members of the raiding party and claim to have remained present throughout the raid, do not speak about the charas being recovered from the bag in possession of appellant Shobram. Thus, there is no consistency whatsoever in the prosecution case.

19. The presence of P.W.3, panch witness is rendered doubtful in view of the fact that he claims he does not know who was driving the Maruti car in which he and the other panch were travelling. According to him, the panch alongwith P.W.4 P.I. Prabhu Dessai were sitting on the rear seat of the Maruti car. P.W.4 P.I. Prabhu Dessai and P.W.5 P.I. Tony Fernandes have admitted that the second panch Niwas Dessai was driving the car. In fact, P.W.3 states that he would not be able to describe the person who was driving the car. In view of the above discrepancies, it is extremely difficult to hold that charas was recovered from the bag which was being carried by appellant Shobram. Relying on the unreported Judgment of the Division Bench in Criminal Appeal No. 673 of 1996 and Criminal Appeal No. 14 of 1997 (Supra) it is clear that there was no compliance with the mandatory provision of Section 50 of the N.D.P.S. Act and, therefore, it is extremely hazardous in the absence of any cogent and reliable evidence, to come to a conclusion that

contraband was seized from the possession of the appellants.

20. I have given my anxious consideration to the submissions of the learned counsel for the parties and I have perused the Judgment and the evidence of the prosecution and I am of the considered opinion that the prosecution has failed to establish the offence against the appellants beyond reasonable doubt. The appellants are, therefore, entitled to be given benefit of doubt.

21. In the result, therefore, both the Criminal Appeals are allowed. The conviction and sentence passed against the appellants by the Special Judge, N.D.P.S. Court, Mapusa, in Special Criminal Case No. 2 of 1999 convicting the appellants for an offence punishable under Section 20(b)(ii) of the N.D.P.S. act, 1985 and sentencing them to suffer rigorous imprisonment for ten years and fine of Rs. 1 lakh, in default simple imprisonment for one year is, hereby, quashed and set aside and the appellants are acquitted for the offence for which they were charged. The appellants are set at liberty. Fine, if paid, be refunded to the appellants.

(P.V. HARDAS)
JUDGE.

ed's.